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hurdles" the FCC will impose against continued state rate regulation:

states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [sic] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.^{28/}

The record in this proceeding reveals that this heavy burden of proof cannot be sustained. Clearly, market conditions have and will continue to protect subscribers against unjust and unreasonable rates and rates that are unjustly or unreasonably discriminatory. The record is devoid of any persuasive evidence of unjust or unreasonable discrimination by the wholesale carriers against subscribers and cellular end users. The practices alleged by the resellers to be discriminatory are unsupported and such arguments have previously been rejected by both the FCC and the Department.

Indeed, in 1991 the Department determined that cellular wholesale services met the regulatory criteria for forbearance from regulation as set forth in the Department's regulations, but determined to continue existing rate regulation on the ground

^{28/} Second Report and Order at ¶ 23.

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that it was not convinced that such regulation would impede competition.^{29/} While the Department's underlying conclusions regarding practices of the wholesale cellular carriers in 1991 remain valid and were reaffirmed in this proceeding, the record here also demonstrates that the regulatory and market environments for mobile services have changed significantly.

First, the Department must now consider its decision to continue regulating the rates of wholesale cellular carriers in the context of the Budget Act and the new Congressional mandate for regulatory parity and presumption in favor of preemption of state rate regulation. Second, the position of Bell Atlantic, a major force in the telecommunications industry, has now been established as a significant competitive force in both the wholesale and retail markets in Connecticut. Finally, Connecticut is on the verge of the explosive entry of a multitude of significant new mobile services providers into the State. These new entrants are likely to be experienced telecommunications players, such as MCI, AT&T and the Regional Bell Operating Companies. These companies are adept at leveraging their expertise and experience into new markets and capitalizing on disparity in regulation to gain market advantage. Tr. at 391. While the new competitors are not yet operational in Connecticut, there is no doubt that they will soon arrive and

^{29/} *Forbearance Decision* at 6.

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that they will offer further competition in the Connecticut mobile services marketplace. These significant market and regulatory changes since 1991 fully support a decision by the Department not to petition the FCC for continued authority to regulate the rates of wholesale cellular carriers.

III. THE FCC HAS DETERMINED THAT CELLULAR RATE REGULATION IS UNNECESSARY AND WILL IMPEDE COMPETITION

A. The FCC Has Determined It Is In The Public Interest To Forbear From Tariff Regulation of Cellular Carriers

The FCC, applying a standard similar to the standard applicable to state petitions, has found that forbearance from regulation of the rates of cellular providers is warranted. Pursuant to Section 6002(c)(1) of the Budget Act, the FCC is authorized to forbear from specific regulation of commercial mobile radio services if it determines that forbearance from such a regulation satisfies the criteria enumerated by Congress. Specifically, the FCC may forbear from specific regulation of a commercial mobile radio service if it determines that:

(1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such provision is not necessary for the protection of consumers; and

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(3) [forbearance] is consistent with the public interest.^{30/}

Applying these statutory criteria, the FCC has decided to forbear from rate regulation of cellular carriers.^{31/} The FCC made this determination despite its conclusion that the cellular services market is not fully competitive -- an argument repeatedly raised by the resellers in this proceeding in support of their position for continued (and indeed increased) rate regulation.^{32/}

The FCC identified a number of competitive costs of requiring cellular carriers to file tariffs in a competitive environment even before the full scale introduction of ESMR and PCS:

tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and costs, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings. Second, tariff filings would enable carriers to ascertain competitors' prices and changes to rates which might

^{30/} Budget Act, § 6002(c)(1) (emphasis added). In making the third determination as to the public interest, the FCC may base its determination on a finding that forbearance from such regulation will promote competition among providers of commercial mobile services -- a finding that it has already made regarding cellular rate regulation. Budget Act, § 6002(c)(1)(C); *Second Report and Order* at ¶ 177.

^{31/} *Second Report and Order* at ¶ 175.

^{32/} See, e.g., Tr. at 716, 719-20, 837.

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encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition. Finally, forbearance will foster competition which will expand the consumer benefits of a competitive marketplace. The absence of tariff filing requirements and the attendant notice periods should promote competitive market conditions by enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages. In this context, with the near-term growth of competition, it is reasonable to conclude, . . . that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition. In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers is in the public interests.^{23/}

These factors are equally applicable to the intrastate wholesale cellular market in Connecticut. The evidence in this proceeding supports the FCC's conclusion regarding the competitive costs of tariff regulation and supports the public interest in discontinuing tariff regulation of the wholesale cellular carriers. See Tr. at 580.

^{23/} Second Report and Order at ¶ 177 (emphasis added).

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**B. The Arguments Raised by the Resellers Have
Been Rejected By the FCC and the Department**

The arguments raised by the resellers in this proceeding to support continued regulation, including the existence of a duopoly market and the absence of wholly substitutable services have already been rejected by the FCC as a basis for continuing rate regulation of cellular services.^{34/} In addition, many of the specific practices complained of by parties advocating increased regulation in this proceeding previously have been examined and approved. For example, in 1992 the FCC determined that the bundling of cellular customer premises equipment and cellular services is in the public interest.^{35/} Similarly, the volume discount structure of Springwich's tariff has been declared equitable and non-discriminatory by the Department in two prior dockets.^{36/} And, in 1991, after an extensive proceeding, the Department found that Springwich's rates were based on prudent costs. (Indeed, Springwich's rates have always been below the maximum authorized by the Department, and

^{34/} Second Report and Order at ¶¶ 146-147.

^{35/} See *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 F.C.C. Rcd. 4028, 4032 (1992). Indeed, when faced with the same issue, the Department also has determined that the issue of bundling of cellular customer premises equipment and cellular services is an issue limited to retail cellular services that are not regulated by the Department. See also *Forbearance Decision* at 6.

^{36/} *Id.* at 6 and decision cited therein.

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Springwich has never sought to raise its rates at all, let alone to raise them above the maximum.)

IV. THE RECORD IN THIS PROCEEDING ESTABLISHES THAT
MARKET CONDITIONS PROTECT SUBSCRIBERS FROM UNJUST
AND UNREASONABLE RATES AND THAT WHOLESALE CELLULAR
RATES ARE NOT UNJUSTLY OR UNREASONABLY DISCRIMINATORY

A. Competitive Mobile Services Available in Connecticut

The Connecticut mobile services marketplace is currently served by a number of providers that offer a range of mobile services to meet consumers' needs. Tr. at 48, 55. Springwich has been offering wholesale cellular services in Connecticut since February 1, 1985. The Metro Mobile Companies initiated wholesale services in 1987, and Bell Atlantic purchased the Metro Mobile Companies in 1992.

The acquisition of the Metro Mobile companies by Bell Atlantic invigorated the degree of competition in the wholesale cellular and retail services market significantly. Since 1986, the percentage of market share of Springwich and Metro Mobile has fluctuated with Metro Mobile/BAM gaining a higher market share than Springwich in 1993. See Springwich TE-11 (Brennan Direct) Ex. 6; Tr. at 51. This market fluctuation demonstrates the competitive behavior of each carrier as they both seek to maximize subscribership through resellers and increase their wholesale revenues. Springwich expects the competition between the wholesale providers to continue and accelerate if rate regulation is discontinued. Tr. at 1639, 1644.

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In addition to the wholesale cellular providers in Connecticut, there are at least 15 resellers that provide cellular services. See Tr. at 48. These cellular resellers provide Connecticut end users with a range of competitive choices in purchasing cellular services. At the retail level, resellers offer a diversity of pricing plans that provide consumers with a range of different service options to meet the changing usage patterns of mobile service users. Tr. at 90. These plans often are offered below the reseller's basic plan rates and are attractive particularly to first time users of cellular services. Tr. at 844, 893-894.

Paging services are widely available in Connecticut. There are approximately forty paging companies offering paging services in Connecticut that are often substituted, in some form, as a lower cost alternative to certain uses of cellular services. See Springwiche TE-11 (Brennan Direct) at 6, Ex. #1; Tr. at 56, 395. Dispatch and SMR services also are available in Connecticut today and are offered by reseller companies such as Connecticut Telephone and Communications System, Inc. ("Connecticut Telephone"), as an unregulated alternative to certain uses of cellular services and in packages tailored to meet the mobile users needs. Tr. at 874; LF #19; LF #20. These services will soon compete with ESMR services that Nextel/MCI will offer in Connecticut early next year. Tr. at 56-58; LF #1.

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B. The Mobile Services Market in Connecticut has Experienced Continued Growth in Providers and Subscribership

The record in this proceeding demonstrates that the wholesale cellular market in Connecticut has been characterized by high growth, significant network investment, expanding coverage and services, declining prices, and intense competition between Metro Mobile/BAM and Springwich over the past five years. Tr. at 48. This growth is demonstrated by the increase in the number of service providers as well as the significant increase in the number of subscribers to retail cellular services. Springwich TE #17-05. Since 1985, the number of resellers has grown from 8 to 15. Over the past five years, subscriber growth has averaged in the double digits. See Springwich TE-11 (Brennan Direct) at Ex. 6; Tr. at 51. Springwich's year-end estimates for 1993 indicate 86,052 active cellular numbers, while Metro Mobile/BAM reported 101,139 active cellular numbers. Springwich TE #17-09; Tr. at 63. This growth in subscribership over the past 5 years has been shared among the resellers and has not been limited to the retail affiliates of the wholesale providers. Subscribership is predicted to continue to expand for all commercial mobile services and for cellular services as well. Tr. at 1214. This expansion of the market is evidence of a market that is responsive to customers' needs and of a market

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that protects subscribers from unjust and unreasonable rates and rates that are unjustly or unreasonably discriminatory.

End users in Connecticut also have benefitted from the vigorous competition that has emerged in the retail cellular market and that has been supported by the continuing decline in prices at the wholesale level and by other efforts of the wholesale carriers to support resellers. The responsiveness of wholesale providers to resellers' requests for promotions and price reductions, such as an independent reseller's request that Springwich make its \$2.00 access rate reduction permanent, make vigorous retail competition possible. Tr. at 1635.

C. While Network Investment Has Steadily Increased
Wholesale Cellular Prices have Declined

Market forces in the Connecticut mobile services market have stimulated network investment by the wholesale carriers as they seek to compete on service quality and coverage as well as price. Since 1985, Springwich has continued to invest in its network, expanding coverage and facilities and thereby providing additional network value to cellular subscribers. The number of cell sites has expanded from 17 in 1985 to 77 in 1993.

Tr. at 54; Springwich TE-11 (Brennan Direct) at Ex. 8. In the immediate future, additional significant investment is planned. See LF #4. Springwich's rate reductions, promotional activities, and sizable network investment, have all been made in direct response to competitive Connecticut market conditions and end

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user needs. Strong subscriber growth and the fact that wholesale rates have consistently declined well below the Department-approved maximum rate, provide concrete evidence of the competitive, dynamic market that exists in Connecticut today. Tr. at 53.

The projections on future investment provided on a protected basis by Springwich further demonstrate Springwich's continuing commitment to providing its resellers with the ability to offer state-of-the-art cellular services and expanding network coverage. These numbers demonstrate an increasing and accelerating investment as the company continues to expand network coverage to serve the growing demand to accommodate portable mobile phones that operate at low power and to transition to a digital platform that will compete with new CMRS providers. Tr. at 1220. While parties supporting the extension of rate regulation argue that competition from non-cellular sources is futuristic and therefore irrelevant, Springwich is engaged in vigorous competition from Metro Mobile/BAM today, and is anticipating and responding to the imminent arrival of additional competition from new entrants such as Nextel/MCI and the six broadband PCS providers that will shortly change the Connecticut market. Tr. at 1219, 1252. (Indeed, to wait until after significant new competition arrives to invest in network upgrades and to encourage subscriber growth would be imprudent,

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if not irresponsible, given increasing end user demand for cellular service and for related wider network coverage.)

In the midst of this escalating investment, Springwich's rates to resale customers have declined consistently. Although it has the authority to increase its wholesale rates under the flexible tariff approved by the Department, Springwich has never requested a rate increase. In fact, since 1987, Springwich's average monthly cost per subscriber shows a decline of more than 40 percent. In addition, Springwich has actively participated in rate decreases through five permanent rate reductions. In addition to these permanent rate reductions, Springwich has provided 11 promotional offerings, including promotions that reduce cellular number and usage rates. Tr. at 53.

D. The Calculated Rates of Return for Each of the Wholesale Cellular Providers is Reasonable and the Projected Rates of Return Demonstrate that Market Conditions are Protecting Consumers in Connecticut

The FCC has identified the annual revenues and rates-of return of each provider over whom a state seeks to extend rate regulation as one form of evidence that may be submitted in support of a petition. In addition, the resellers have premised their argument for continued rate regulation on their prediction that the wholesale providers were earning supra-competitive profits. The financial data provided by the wholesale carriers in this proceeding has refuted the resellers' prediction and

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provides no basis for the FCC to sustain a petition by the Department.

The calculated rates of return for both carriers convincingly demonstrate that competitive market conditions exist today in the wholesale cellular market in Connecticut, and that these forces adequately protect subscribers. Reseller witness King testified that a rate of return for a cellular carrier within the range of 14.75% is a "reasonable approximation" of an expected rate of return on total capital.^{37/} Tr. at 131. Dr. Jerry Hausman testified that using the Capital Asset Pricing Model developed by Nobel Prize winners Harry Markowitz and Bob Sharpe, the expected estimated equity cost of capital for a cellular company based on the perceived risk associated with the cellular industry is 20%, using as a model the Value Line beta for McCaw Cellular Communications, Inc. Tr. at 1226; LF #32. If the average Value Line betas for other companies with cellular interests are used instead, as proposed in questioning by the Office of the Attorney General, the estimated equity cost of capital would be approximately 17%. Tr. at 1336, 1368.

As demonstrated in the protected record in this proceeding, and described in Sections 1 and 2 below, which are being filed pursuant to Protective Order, the calculated rates of return for

^{37/} Mr. King testified that he would not quibble with whether 14.75% is the "precise number" for an appropriate return but agreed that it is a reasonable approximation. Tr. at 719.

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each carrier are reasonable . . . [redacted] . These figures clearly refute any allegation that either of the wholesale carriers is earning supra-competitive profits. These figures also demonstrate that market conditions will protect, and have protected, subscribers from unjust and unreasonable rates and unjustly and unreasonably discriminatory rates rendering further regulation by the Department unnecessary.

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1. The Springwiche Rates of Return are Not Excessive

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2. The Metro Mobile Calculated Rates of Return are Not Excessive

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E. New Providers of Commercial Mobile Radio Services Will Enter the Connecticut Market and Provide Services that Compete with Cellular Services Without Being Subject to Entry Barriers or Rate Regulation

The Connecticut wireless marketplace is a particularly attractive market for new wireless service providers and has already been targeted as a key market by a number of new providers. Connecticut ranks first in per capita income in all states in the United States. Tr. at 52; Springwch TE-11 (Brennan Direct) Ex. 4. In addition, the geographic proximity of Connecticut to the New York City metropolitan area, and the desirability of providing continuous coverage through these regions, contributes to Connecticut's ranking as a primary market for the roll out of new services. Not surprisingly, therefore, Nextel has targeted the New York Metropolitan area, including Connecticut, as its second target market after Los Angeles, and is expected to begin operation here in early 1995. Springwch TE-11 (Brennan Direct) Ex. 3; LF #3; Tr. at 49. In fact, Nextel already has begun to acquire tower sites in Connecticut to begin deployment of its network. LF #1; Tr. at 58.

Nextel's service offerings are expected to include interconnected services that will compete directly with cellular services. Nextel's services also will offer additional functionalities that will be immediately available from their digital technology and that are not currently available from analog cellular systems. Tr. at 395. With Nextel's entry into

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the Connecticut marketplace, Connecticut end users will have an additional service option to meet their mobile communications needs that will increase the competitive market pressures on all providers of mobile services.

The introduction of PCS in Connecticut will also swell the number of commercial mobile service providers and competitive mobile services available to Connecticut consumers. Two forms of PCS (narrowband and broadband) have been authorized by the FCC. Licenses for each service will be auctioned by the FCC later this year.^{38/} Earlier this month, the FCC finalized its technical service rules for broadband PCS service.^{39/} In its revised rules for broadband PCS, the FCC made several changes to its spectrum allocation plan to accelerate the roll out of PCS and in an attempt to keep PCS service costs reasonably low to compete directly with cellular services. The FCC's broadband PCS rules further encourage direct competition between PCS and cellular providers by limiting the ability of cellular providers, such as

^{38/} Tr. at 50. Two pioneer's preference winners also have been awarded PCS licenses free of the auction process to provide service in areas that include the Connecticut. Tr. at 49. Since these two licensees will not be required to purchase spectrum through the auction process, these awards will accelerate the roll out of PCS in Connecticut and provide these PCS service providers with a reduced cost structure for providing PCS.

^{39/} Supplement to LF # 21; *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, Gen. Docket No. 90-314, FCC 94-144 (rel. June 13, 1994).

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Springwich and Metro Mobile/BAM, to acquire PCS licenses. Under the FCC's rules, Springwich and Metro Mobile/BAM will each be limited to applying for a license for only one of the six PCS channels and to a smaller 10 MHz channel until 2000 when they each may acquire an additional 5 MHz of spectrum.^{40/} These restrictions will significantly enhance the competition between cellular services and PCS.

While PCS networks are not yet operational in Connecticut, the wholesale cellular carriers already are preparing for their entry. PCS is not a mere glimmer in Wall Street's eye. PCS networks are already constructed and operational in the United Kingdom and numerous tests have been conducted in the United States. PCS systems in the U.K. compete directly with cellular services and have been successful in obtaining market share from cellular carriers. Tr. at 389, 426. The FCC's use of auctions for the first time as the licensing system provides an immediate, financial incentive for licensees to quickly deploy their networks and begin offering service. Springwich TE-11 (Brennan Direct) at 12; Tr. at 390. As demonstrated by Mr. Brennan's forecasts of the future mobile services market in Connecticut,

^{40/} Id. at ¶ 17k. Unlike the FCC's earlier cellular licensing allocations, the wireline carrier affiliate will not receive any PCS spectrum allocation. Therefore, unlike the two pioneer preference licensees discussed above, should Springwich seek such permitted spectrum, it will have to participate in the FCC's auction process.

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the PCS providers in Connecticut are likely to be large telecommunications companies, such as MCI, AT&T and the Regional Bell Operating Companies, and cable companies that can quickly leverage their expertise, marketing savvy and name recognition to attract new subscribers and lure subscribers away from cellular services.^{41/}

As shown above, the Department's authority to regulate the entry and rates of mobile services is preempted by the Budget Act except for those services over which the state exercised rate regulation on June 1, 1993.^{42/} This authority does not extend to PCS or ESMR providers. The new entrants in the Connecticut market therefore will not face any barriers to entry or rate regulation by the Department. If the Department petitions the FCC for continued rate regulation, cellular wholesale providers will be the only mobile service providers in the competitive market subject to rate regulation. This disparity in regulation will inhibit the ability of the cellular wholesale carriers and the resellers of their services to respond to fast-paced market changes that are characteristic of a fiercely competitive market.

V. CONCLUSION

The record in this proceeding is insufficient for the FCC to grant a petition by the Department for continued authority to

^{41/} LF #3; Tr. at 391.

^{42/} See Section IIB2, *supra*.

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regulate the rates of wholesale cellular providers in Connecticut. The evidence presented demonstrates that conditions in the Connecticut mobile services market have and will continue to protect subscribers from unjust and unreasonable rates and from rates that are unjustly or unreasonably discriminatory. The record therefore overwhelmingly supports the conclusion that market forces are working effectively in the Connecticut.

First, the record demonstrates that today, even without operational PCS and ESMR networks, the wholesale cellular carriers actively compete with each other. The vigorous competition between the carriers is evident by the continual decline in wholesale prices and the continued increase in network investment by the carriers. This competition for subscribership has benefitted resellers and ultimately end users and will only accelerate as new entrants begin providing new mobile services in Connecticut.

Second, the arguments raised by the resellers in favor of increased rate regulation have been rejected by the FCC and the Department. The record has not produced any new evidence that was not considered by the FCC in deciding to forbear from interstate rate regulation and tariff filing requirements for cellular carriers. The FCC determined, applying a more stringent standard than will be applied to state petitions, that tariff